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November 13, 2015

**VIA EMAIL**

Mr. Christopher Kirkpatrick  
Secretary of the Commission  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21st Street NW  
Washington, DC 20581

**Re: Aggregation of Positions; Supplemental Notice of Proposed Rulemaking  
(RIN 3038-AD82)**

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Dear Mr. Kirkpatrick,

Ontario Teachers' Pension Plan ("**OTPP**", "*we*" or "*us*") is the largest single-profession pension plan in Canada, with \$154.5 billion in net assets (as of January 1, 2015). It was created by its two sponsors, the Ontario government and the Ontario Teachers' Federation, and is an independent organization. In carrying out its mandate, OTPP administers the pension benefits of 182,000 current elementary and secondary school teachers in addition to 129,000 pensioners. More than 1,100 employees of OTPP help to invest the fund's assets, administer the pension plan, pay out benefits and report and advise on the plan's funding status and regulatory environment. Further information on OTPP can be found at <http://www.otpp.com/>.

We appreciate the opportunity to submit these comments with respect to the supplemental notice of proposed rulemaking published by the Commodity Futures Trading Commission ("**CFTC**", or the "**Commission**") (the "**Supplemental Proposal**"),<sup>1</sup> which supplements and requests further

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<sup>1</sup> *Aggregation of Positions*, 80 Fed. Reg. 58365 (Sept. 29, 2015).

comment on the Commission's 2013 proposal that would update and restate its policies and rules regarding the aggregation requirements of Part 150 of the Commission's position limits rules.<sup>2</sup>

### **Common Ownership Exemption**

OTPP supports the provisions of the Supplemental Proposal that would incorporate a new aggregation exemption in the Commission's rules pursuant to which, upon the submission of a notice filing, an owner entity would be able to disaggregate its positions from those of another entity in which it has an ownership interest, up to 100 percent, subject to certain conditions related to separations of trading control (the "*Common Ownership Exemption*"). We specifically appreciate the incorporation of a formal mechanism that would acknowledge that ownership of another entity is not a *de facto* proxy for control of that entity's trading decisions and trading strategy. OTPP also generally supports, subject to a few minor requests for clarification and refinement that we set forth herein, the conditions proposed with respect to the Common Ownership Exemption. The conditions use a principles-based approach that recognizes and generally permits disaggregation when one entity owns some or all of another entity but does not in fact control the trading or trading strategy of that entity and does not trade pursuant to a coordinated or identical strategy with another entity.

### *Risk Management Information Sharing*

One of the conditions of the proposed Common Ownership Exemption is that the entities "[d]o not have risk management systems that permit the sharing of trades or trading strategy."<sup>3</sup> OTPP believes that this condition of the Common Ownership Exemption is ambiguous and, by its terms, may restrict necessary sharing of trading information for risk management purposes that is nevertheless disconnected from trading decisions and strategy.

In contrast, in the preamble to the Commission's 2013 proposed rules regarding aggregation, the Commission included guidance clarifying expressly that this condition of the Common Ownership Exemption generally would not prohibit sharing of information for risk management purposes, when it is not used for trading purposes or shared with employees that participate in trading decisions.<sup>4</sup> While we presume that this guidance remains valid, we respectfully request that the Commission confirm expressly, in any final rule, that the Common Ownership Exemption will not prohibit information sharing for risk management purposes when such information sharing is not used for trading purposes or shared with employees that participate in trading decisions. To determine otherwise would potentially risk preventing firms from

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<sup>2</sup> *Aggregation, Position Limits for Futures and Swaps*, 78 Fed. Reg. 68946 (Nov. 15, 2013).

<sup>3</sup> See § 150.4(b)(2)(i)(E) of the Supplemental Proposal.

<sup>4</sup> "[T]his criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities' trading decisions. Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees' risk management or compliance activities could be considered to have an 'influence' on the entity's trading." See CFTC, *Aggregation of Positions*, 78 Fed. Reg. 68945, at 68962 (Nov. 13, 2013).

performing vital risk management and enterprise level surveillance functions. In particular, the statement quoted above would appear to prohibit the sharing of trading information even with non-trading personnel and solely for risk management purposes. We do not believe that this result was intended but, without clarification, entities might not have the requisite comfort to conduct their risk management operations, which unnecessarily exposes them to greater risk without providing any further protection to the markets.

### *Presumption of Control*

The Common Ownership Exemption in § 150.4(b)(2) of the Supplemental Proposal generally provides that a person with an ownership or equity interest in an owned entity of 10 percent or greater (other than an interest in a pooled account, which is ineligible for the Common Ownership Exemption as proposed, and which we will address in greater detail below) does not need to aggregate its positions with the owned entity if certain conditions are satisfied.

Proposed rule § 150.4(a)(1) provides that a presumption of control generally applies when a person directly or indirectly holds a ten percent or greater ownership or equity interest in an owned entity, such that the owner entity must aggregate positions with such owned entities unless an exemption is available. For ownership interests of less than ten percent, aggregation is generally not required unless the owner entity actually controls trading or the entities trade pursuant to identical trading strategies.

In his statement supporting the Supplemental Aggregation Proposal, Commissioner Giancarlo specifically invited public comment on whether the Commission should remove the presumption of control, for aggregation purposes, for minority ownership interests.<sup>5</sup> Pursuant to this formulation, the presumption of control for entities that have a majority ownership interest (50 percent or greater) in an owned entity would continue to apply, while the presumption for non-majority ownership interests would be, absent facts indicating otherwise, that the owner entity does not control that trading decisions or strategy of the owned entity. OTPP agrees that a presumption of disaggregation is appropriate for an entity that owns less than 50 percent of another entity, provided that there is in fact no actual control over trading, coordination of day-to-day management or control, sharing of information, or other factors present that would otherwise require aggregation of positions. This is because OTPP believes, and our experience has been, that minority ownership interests generally do not permit the owner entity to exercise control over any operational aspects, including trading strategy and trading decisions, of an owned entity. Accordingly, a presumption that applies below the 50% level would unnecessarily restrict trading activities, including hedging, even where there is no common control. Therefore, we respectfully suggest that the Commission require the Common Ownership Exemption notice filing only in connection with owned entities in which an owner entity maintains a majority or greater ownership interest.

### **LP Exemption**

Pursuant to the terms of the Supplemental Proposal, the Common Ownership Exemption would not be available with respect to interests held by a limited partner (or other similar type of investor) in a pooled account that is a commodity pool. As a consequence, limited partners in vehicles that may meet the Commission's definition of commodity pool are not eligible to rely

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<sup>5</sup> See 80 Fed. Reg. at 58381.

on the Common Ownership Exemption for disaggregation for their investments in these vehicles, regardless of the absence of any ability or intention to participate in trading decisions or strategies.

Instead, these entities must rely on the exemption from aggregation for ownership interests in commodity pools (the “*LP Exemption*”), which exists under current Commission rules and would be re-codified, without substantive amendment, under the provisions set forth in the Supplemental Proposal.<sup>6</sup> Under the terms of the LP Exemption, limited partners that have an interest in pools for which the commodity pool operator (“*CPO*”) is not registered but instead relies on certain of the most common exemptions from the CFTC’s CPO registration requirements are eligible for disaggregation only if they own less than a 25 percent interest in the pool.<sup>7</sup>

In light of the Commission’s determination to adopt a principles-based approach to aggregation exemptions (*e.g.*, the proposed Common Ownership Exemption, which focuses on the principles of separations of control and information barriers between certain groups of employees), OTTPP believes that there is no basis to distinguish between an ownership interest in a commodity pool that is operated by a registered CPO and a similar interest in a commodity pool that is operated by a CPO that is eligible for and has appropriately claimed an exemption from registration. That is, we believe that the Commission should incorporate, for the LP Exemption, the same principles of control, separation and information barriers that will apply to owner entities under the Common Ownership Exemption. Specifically, if a limited partner confirms that similar conditions are met in connection with its investment in a pool, the Commission should remove the 25 percent ownership cap for interest in pools operated by CPOs that are eligible for and have claimed an exemption from CFTC registration. By adopting this change, the Commission would be able to harmonize the aggregation treatment of limited partner investors with that of other investors, provided that neither actually controls trading decisions and trading strategies of the entity or vehicle in which they invest.

### **Independent Account Controller Exemption**

Finally, we are requesting certain modifications to the conditions applicable to the CFTC’s existing exemption from aggregation for certain accounts that are traded by an independent account controller (“*IAC*”). This rule (the “*IAC Exemption*”), which is available under existing Commission rules and would be re-codified without substantive modification under the provisions set forth in the Supplemental Proposal,<sup>8</sup> generally provides an exemption from aggregation in respect of accounts of an “eligible entity” that are carried by an IAC. The definition of eligible entity in existing CFTC rules and in § 150.1(d) of the Supplemental Aggregation Proposal is drafted narrowly and by reference only to certain enumerated classes of entities, such as commodity pool operators, banks and commodity trading advisors, among

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<sup>6</sup> See § 150.4(b)(1)(iii) of the Supplemental Proposal.

<sup>7</sup> CFTC Rule 4.13 generally provides exemptions from registration for operators of commodity pools that meet certain requirements including, among other conditions, operators of pools that have *de minimis* positions in commodity interests and have participants that meet certain eligibility criteria. See 17 C.F.R. § 4.13.

<sup>8</sup> See § 150.4(b)(5) of the Supplemental Proposal.

others, each of which are generally viewed as entities that may, if relying on the IAC Exemption for a particular account or position, be characterized as having fiduciary obligations to the customers or other constituents that are the beneficiaries of that account.

We respectfully request that the Commission modify the existing definition of “eligible entity”, for purposes of reliance on the IAC Exemption, to encompass certain investment vehicles and structures that are similar to but not expressly enumerated in the existing eligible entity definition. We believe that this clarification is consistent with a principles-based approach to aggregation and would allow the Commission to focus on whether there is in fact a delegation of trading control to an independent third party manager. Therefore, we request that the Commission clarify that investment entities such as OTPP and other governmental or pension sponsored investment management vehicles may rely on the IAC Exemption, notwithstanding that they are not an enumerated category of eligible entity, provided that they otherwise meet the terms and conditions of the IAC Exemption. We believe that by including this clarification, the Commission would provide certainty for a range of structures and other investment vehicles, each of which invest on behalf of beneficiaries, stakeholders and other constituent groups,<sup>9</sup> to delegate trading authority over certain accounts to independent external managers without being required to aggregate those positions for position limits purposes.

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<sup>9</sup> For example, it is unclear whether OTPP (which is a fund located outside of the United States and operated for the benefit of and with fiduciary obligations to its beneficiaries), or other funds, vehicles and managers that have fiduciary obligations that are similar to those of a pension fund, bank or insurance company, would qualify as eligible entities based on the current text of the definition and available Commission guidance.

Once again, we appreciate the opportunity to submit these comments offering our support for the Supplemental Proposal and to set forth our suggestions and requests for clarification with respect to certain aspects of the Commission's aggregation rules. We would be happy to discuss any of these issues further or to assist the Commission in any way that may be helpful.

Respectfully submitted,



Gregory O'Donohue

Senior Legal Counsel, Derivatives

cc: Commodity Futures Trading Commission  
Timothy G. Massad, Chairman  
Sharon Y. Bowen, Commissioner  
J. Christopher Giancarlo, Commissioner  
Stephen Sherrod, Senior Economist, Division of Market Oversight  
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